UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE Respondent and LARRY PRETLOW An Individual	)	Cases: 5-CA-180590

RESPONDENT'S BRIIEF ON REMAND

SUMMARY

Respondent, United States Postal Service, respectfully submits the instant brief arguing for dismissal of the case, again. Judge Amchan's original decision rejected General Counsel's evidence and theory of retaliatory discharge and appeared to foreclose the theory of a retaliatory evaluation. Upon remand, Respondent's defense has progressed from strong, unrebutted evidence to (now) overwhelming unrebutted evidence that the evaluation of Charging Party Larry Pretlow was nothing more than a routine personnel protocol, free of any hint of malice.

Regarding the merits of General Counsel's reprisal theory, no new evidence has been produced, and all of the evidence that was put forward in this second round proved beyond doubt that Mr. Pretlow was required to be evaluated (as a probationary employee) for numerous legitimate and compelling reasons having nothing to do with his prior protected activity. The reasons for the prior decision are even more compelling now and the case should be dismissed.

General Counsel has now seized upon a new theory to justify its prosecution, despite the continued absence of any evidence of animus or hostility toward Charging Party. General

Counsel's entire case had been based on the erroneous belief that there were three other employees who were similarly situated to Charging Party (city carrier associates who converted to regular city carrier status) yet had not been given evaluations. Respondent proved beyond doubt that the three employees were not similar at all to Charging Party and did not present the same opportunity for evaluation (upon conversion) as did Pretlow. In response, General Counsel has shifted its theory, arguing now that Pretlow should be compared to all carriers, not just those who were converted to regular at the Engleside facility. That is an improper change in theory, but it also suffers from the same lack of supporting evidence.

Moreover, General Counsel's only remaining theory is to try to create suspicion of disparate treatment from an inference based on few documented evaluations. But even that alleged appearance is nothing more than supposition. General Counsel simply doesn't know who was on probation at Engleside, and thus cannot know whether they were or should have been evaluated. Based solely on the lack of documents, General Counsel presumes the worst. But the presumption is built on a mountain of fluff, not actual evidence. And there is a perfectly good reason, in fact several, for the absence of more documented evaluations.

A finding of animus and a nexus to assert retaliation depends at least on some evidence and not mere suspicion and innuendo. There is not a scintilla of direct evidence in this case of actual malice or animus. There is no more than a speck of inference to be drawn, and even that suspicion becomes unreasonable upon minimal scrutiny. General Counsel cannot prevail simply based on speculation and unsupported conjecture. Inferences have their limits and must still be reasonable under the circumstances. No hostile inferences are feasible here. The actual evidence in this case clearly shows Pretlow was evaluated for legitimate reasons. A quick summary of the weight and variety of the evidence overall should put the case in perspective to assess the facts individually.

The reasons for Pretlow's evaluation:

- The Arbitrator's award required further probation and evaluative assessment;
- Respondent's handbooks; union memoranda; collective bargaining agreement and explanatory materials require evaluations for employees on probation;
- Evaluations are advantageous for probationary employees to learn the job and correct deficiencies; they also provide an alternative to removal without recourse for employees who otherwise work "at will";
- Evaluations are routine non-disciplinary events and Pretlow was advised his first day back he would be evaluated on his progress;
- Respondent could not have known that Pretlow would behave so bizarrely, and thus the evaluation itself could not have been staged as pretext;
- USPS needs a means to assess the progress to gauge improvement and provide corrective feedback before the employee becomes a permanent liability;
- "Probation" inherently implies an on-going evaluative assessment. A formalized meeting with written criteria simply makes the probationary assessment more tangible, clear and consistent – and less arbitrary or unreliable.

General Counsel's disparate treatment claim relies solely on the lack of records and is no more than conjecture.

- Employees Walker, Ruffner and Hintz were never comparators to Pretlow and were never similarly situated to him, thus their (alleged) lack of evaluation is irrelevant;
- There were no other career (regular) carriers like Pretlow at Engleside, so there is no one else who is a comparator;
- There were no examples of anyone, CCA or regular city carrier at Engleside, who

was on probation there but was not evaluated. We do not even know for sure which employees were on probation at Engleside throughout their probation status. Many employees (CCAs) came and went from Engleside at some point who served probation (and received evaluations) elsewhere. What happened with them elsewhere is unknown and irrelevant.

- Employees, whose names appear in General Counsel exhibits such as Latney, McCree, Harley and Humphries are not comparators and there is essentially no information about their circumstances except conjecture, based on an absence of records. There is no actual evidence about their probationary status or evaluations, except from Mr. by Khan. There is no evidence they were not evaluated.
- Probationary employees at Engleside were evaluated, though few documents remain. Additional documents would have been helpful to Respondent and detrimental to General Counsel's theory. Hiding them would be counter-productive.
- Respondent made repeated and exhaustive efforts to find any and all evaluation documents. Many people searched on many occasions and in many places. Inadequate, outdated and poorly functioning documentation and retrieval systems are, unfortunately, a fact for a large and financially-strapped government bureaucracy.
- There is a compelling reason more documents were not found. The Postmaster discarded all kinds of furniture, cabinets and files in fits of rage over "messy" work areas. This took place repeatedly at Engleside and elsewhere and had nothing to do with Pretlow. And while the document loss is disturbing and harmful it says nothing relevant about disparate treatment. In legal terms, it is the same as an accidental fire.

It explains the absence of documents and does not permit an adverse inference.[1]

THE NEW FACTS

Because General Counsel alleged that Pretlow's evaluation was retaliatory the Judge directed Respondent to produce information about three (3) separate subjects, including about the job status of the three (3) alleged comparators; Respondent's policies requiring evaluations; and evidence of actual evaluations. Respondent produced all of that evidence, and more. All the evidence demonstrated a compelling basis for evaluation and no basis for suspecting malice. General Counsel produced no new evidence other than accusation based on an inference for a disparate treatment supported only by an adverse inference theory based on (allegedly suspicious) missing records. Any weak link in that chain of inferences causes the entire theory of disparate treatment (and with it, inferred malice) to fail. And there are many weak links.

For many years, Postal Service rules have required that supervisors conduct periodic evaluations of probationary employees, typically at the 30-day, 60-day, and 80th-day of an employee's probationary period. Such evaluations are mandatory; a "must." (RX-10 - Handbook EL 312, Sec. 584 "Employee Evaluations," See 584.52 Supervisor "must" evaluate employee at end of 30 days and fill out Form 1750; Tr. 352-53, 417) The rule, in section 584.62, also requires an initial meeting with the manager at start of the period to outline expectations.

Mr. Khan met with Mr. Pretlow initially to outline the expectations and have him initial the Form 1750[2] and also advise him of the future evaluation meetings to discuss his progress.

[1] GC raises the extraordinary argument that evaluations for Hemphill and Farmer (December 2017) which were turned over during recent discovery reveal a scheme to dodge an earlier (allegedly on-going) subpoena requirement. GC seeks sanctions, yet the documents didn't exist at the time of the 2017 trial, decision or appeal. Apparently, GC claims the subpoena extends indefinitely into the future and does not end with the production at trial. This allegation seems absurd.

[2] Even absent a directive from the arbitrator or the rules, and regardless of other employees, it would have made sense for Mr. Khan to be extra careful in dealing with Pretlow in order to avoid any appearance that he was not

Mr. Pretlow has also complained repeatedly that he was never allowed to succeed and he complained specifically about a lack of appropriate training and feedback. He said: "Also as a CCA I was never evaluated, at all. I was also not properly trained because the US Postal Service does not provide proper, sufficient, effective and adequate training for CCA's nor when a CCA transitions to a Career Regular." (RX-7, pg. 33 of 41)[3]

The collective bargaining agreement sets out a probationary period of 90 days for employees. (RX-13) Although the CBA language in Article 12 refers to "new" employees, such language is old and is supplemented elsewhere, and goes beyond merely new employees.

A Memorandum of Understanding (MOU) found on page 150 of the Appendix B to the CBA refers to and describes further what Article 12 requires regarding City Carrier Assistants (CCAs). It explains that when a CCA (a term employee – hired for a term of 360 days) completes two successive terms, the CCA will not be required to serve a new probationary period. The implication is that if such CCA had not yet completed the second consecutive term appointment then he would be required to serve a new probationary period when converted to a (regular) career appointment. (RX-14) Article 12 also provides that employees who are in a probationary status can be separated without recourse to the grievance process and are essentially at-will employees.

The Joint Contract Administration Manual (JCAM), which has the same force as the CBA itself (Tr. 355), states that a CCA "who receives a career appointment must go through a probationary period as a career employee under certain conditions."[4] It cites the MOU on

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providing Pretlow the maximum chance to succeed. So he should have met and arranged for periodic reviews and mentoring (which he did).

[3] So this is one of those "damned if you do . ." instances. Pretlow would complain of the lack of effective training, feedback and evaluations or anything that might help him succeed, but then also complain if someone took those steps to help him better prepare for his job. Again, out of an abundance of caution, it makes sense that the manager would want to provide Pretlow adequate training and feedback (evaluation), not as a ruse for retaliation, but as fulfillment on the assurance to reinstate him and provide an opportunity to succeed.

[4] Such converted regulars, despite having more than 90 days service, are also probationary and also are prohibited

probationary status. (RX-12, pg. 2 ["12-2"]) Page 12-3 of the JCAM spells out the conditions when a new probationary period is required for a CCA who converts to regular career status. It states that a new probation period is required unless: the employee completes two successive 360-day appointments, the employee was a "transitional" employee, or was converted from a CCA position after having served as a transitional employee.[5]

CCAs are not the equivalent of regular city carriers. Among others, the USPS placement letters describe the limited conditions under which CCAs are employed. (GC-13) "A City Carrier Assistant" is a non-career bargaining unit employee hired for a term not to exceed 360 calendar days for each appointment." At the end of the appointment, the CCA's term expires and, unless renewed, the employee is separated without future employment expectation. Terms must serve a 5-day break in service.[6] After the break in service, a term can be hired to a new 360-day appointment, indefinitely. Such employees are "non-career" – meaning they have no permanent employee status and no expectation of continued employment beyond the "term" of their appointment.

On March 16, 2016 the parties to the NALC Agreement (CBA) signed an MOU addressing how they would deal with CCAs who were (at that time) converting to regular status and the circumstances under which a new probationary period would be required. They attached a list of questions and answers to clarify the arrangement. (RX-11, see in particular question 36, page 6). The MOU provides that a CCA converted to career status does go through a (new) 90-day probationary period. "Yes, except in the following circumstances." It sets out the same exclusions as in the JCAM (which do not apply to Mr. Pretlow).

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from grieving their separation during probation. (RX-12, pg. 12-2) That they are not "new" is irrelevant both to probation and to evaluation requirements.

[5] None of these exceptions apply to Pretlow. Thus he was required to be in a probationary status – as the arbitrator also directed.

[6] This is ostensibly to avoid triggering automatic civil service (career) status based on a full year of service.

In his original testimony and again during the remand hearing, Mr. Khan testified that he learned of the requirement that CCAs who are converted to regular must undergo a new probation period and evaluation. He could not recall the exact date, but believed the manager meeting announcement was within a few months before Pretlow was rehired in May 2016. More recently, he estimated that the date was sometime in the spring or perhaps April of 2016. (Tr. 438) Mr. Khan did not receive copies of the MOU documents and had not seen them until recently. (Tr. 439) But the date of the MOU and the contents suggest that it was this new MOU that Mr. Khan had been informed of (one month) prior to Mr. Pretlow's arrival in May 2016.

At the Judge's request, Respondent produced the personnel files of the three alleged comparators: Jessica Walker, Christopher Ruffner and Lyle Hintz. (RX-15, 16 and 17) The General Counsel stipulated that the three employees were CCAs though not converted to regular status. (Tr. 371-72) They did not convert to regular status as described in the earlier (erroneous) email to the NLRB. They were not similar to Mr. Pretlow who was converted to regular.

Ms. Walker's enter on duty (EOD/seniority) date is 7/16/2016 as a city carrier assistant. She began working more than a month after Pretlow was terminated. She left the Postal Service as a CCA on 5/26/2017. (RX-15, pg. 2) She is listed as having been hired initially at the Alexandria, Virginia (Main) Post Office, not Engleside. (page 6, lines 33-36) Her next Form 50, dated 11/28/2016 reflects a new work location at Engleside. Walker was given evaluations on 10/7/2016 (and 8/15/2016 and 9/15/2016). (RX-18 – produced to the Region in 2016)

Christopher Ruffner was hired initially on 1/16/2016 as a CCA (GCX-13, pg. 3, RX-16, pg 2). His placement letter says he was hired at the Alexandria Main Post Office, not at Engleside. (GCX-13) Ruffner moved to the Alexandria Trade Center Station by 2/06/2016, within his first 20 days. (RX-16, pg. 10, lines 33-36, see also pg. 8, lines 33-36 and pg. 5, lines 33-36) Ruffner did not spend his first 90 days (probationary period) at Engleside, according to

his Form 50s or his placement letter or the Engleside list (spreadsheet). His training and evaluation records likely would not have been kept at Engleside.

Ruffner began working at Engleside at some point. It is not clear when. The spreadsheet of employees who worked at Engleside (GCX-20, pgs. 4-6) indicates he did not work at Engleside in 2016 nor in 2017 (at least not officially), but only in 2018. Khan explained that CCAs move around quite a bit and go where needed, even if on a short term basis. Ruffner's Form 50 indicates he transferred to Engleside (officially) only in September 2017. (RX-16, pg. 6) The earlier Form 50s state he worked at Alexandria Main and at Trade Center for the first 18 months, well past his 90-day probation period. There is no evidence that he spent any substantial part of his probationary period at Engleside. He likely was not evaluated at Engleside.[7] Since he transferred to Trade Center immediately after being hired, his evaluations likely took place there.

Lyle Hintz, Jr. was hired on 12/12/2015 at Northern Virginia P&DC as a casual employee (non-letter carrier). (RX-17, pg. 9, lines 33-36 and 52) He was hired as a CCA at the Alexandria Main Post Office on 1/16/2016. (RX-17, pg. 7) On 1/23/2016 he was transferred to

[7] On cross-exam Mr. Khan was eager to cooperate with GC and agree to his leading question, based solely on the documents (and not personnel recollection) that Ruffner must have started at Engleside. (Tr. 453) But the document did not say that. Instead, GCX-13 (the placement letters) only stated when Ruffner began, not that it was at Engleside. In fact, the placement letter and Ruffner's Form 50 say he started at Main and then went to Trade Center. Credit GC for clever lawyering. Even if Ruffner spent some early time at Engleside there is no evidence he spent the entirety of his 90-day probation there (and thus could only have been evaluated there). On February 6, 2016, just three weeks after starting at the Main Post Office, Ruffner was officially transferred to the Trade Center, where he was officially stationed for more than another year. (RX-16, pg. 10) Khan admittedly had no knowledge of any of the employee's original start dates and he was in and out of several offices regularly, as were the CCAs. (Tr. 444, 446, 456, 457). Several other CCAs started at Main and were assigned to Engleside off-and-on, such as Humphries, Latney, Walker, Harley, Issa and Sinclair. (See Tr. 446-463; GCX-13, GCX-20 and RX15-17). Khan could not pinpoint their time at Engleside either. Ruffner likely worked early on at Engleside, at least some (despite his Form 50s showing different locations). There is no evidence how long or when or even if this was during his probation period. He could as easily have worked 3 days or 30. There are no records to say one way or another. Mr. Khan was not asked by GC about the duration and whether it was during probation or whether Ruffner was evaluated. The actual evidence (as opposed to inference) was not sought, though GC clearly had the chance and a cooperative witness who was trying to be helpful.

Engleside (according to his Form 50). (RX-17, pg. 5) As of 9/01/2017, Mr. Hintz was never a regular city carrier like Pretlow. Khan testified however, that he was involved in Mr. Hintz's probationary evaluation(s). He said he was aware of those documents and that he looked for them but could not find them. (Tr. 426-27) He believed they were discarded with other documents, files, and furniture. (Tr. 427) Mr. Khan testified that he was familiar with at least two other probationary evaluations for McCree and Humphries. (Tr. 427) Both were hired in 2014 and were working at Engleside in 2015. (GCX-20, pg. 3) McCree's placement letter says he was hired at Alexandria Main, not Engleside. (GCX-13, pg. 2) Nonetheless, Mr. Khan witnessed his evaluation documents. (Tr. 427) Humphries' too. Precisely when, during their initial probation periods, they worked at Engleside, and for how long, is unknown.

Other employees are alleged by General Counsel to have worked at Engleside as probationary CCAs during probation. But no evidence of that allegation was put forward other than the placement letters (GCX-13) and the Engleside spreadsheet (GCX-20). Each of the starting locations in the placement letters is listed as the Alexandria Main Post Office, however, not Engleside. So GCX-13 reveals nothing about whether an employee started or was in probation at Engleside. GCX-20 was characterized as inaccurate and perhaps based on Form 50 official assignments rather than actual working locations day-to-day.

General Counsel first claimed that Mr. Latney started at Engleside, despite that his placement letter (GCX-13, pg. 1) says he began at Main. Mr. Khan agreed that Latney worked at Engleside at some point, but he did not know when or whether Latney "started" at Engleside. (Tr. 452). GCX-20 lists employees who worked at Engleside but it does not list Latney working there in 2015 when he was first hired and in probation. (pg. 3)

General Counsel suggested that Darin Harley began at Engleside in 2016, apparently based on the date of the placement letter. (GCX-13, pgs. 5-6) The letter says Harley was placed

at Alexandria Main initially. GCX-20 (pgs. 4-5) indicates that Harley was at Engleside in 2017, but not in 2016 (likely a year or more after starting, and well past a probationary period). Mr. Khan explained that Harley first started at "Community" but then Khan was cut off.[8] (Tr. 454) Khan explained further that Harley worked at a different facility and passed probation there and only later transferred to Engleside. (Tr. 454)

General Counsel suggested that Latasha Humphries was converted from a CCA to a regular career city carrier in 2016 at Engleside, based on GCX-20. Mr. Khan corrected that assertion, explaining in detail that she was employed at some point at Engleside as a CCA. He wasn't sure exactly when. (Tr. 457) He had previously testified that he was aware of a probationary evaluation for her, but that he could not locate the document. (Tr. 427) That was likely as a CCA, and sometime in 2014, based on her earlier start date. (GCX-20, pg. 3)[9] He said he wasn't sure when she first started since he was not at Engleside at that time. (Tr. 457-461). He was clear that she did not convert to regular status at Engleside. Rather, she worked at Kingstowne and became a regular there and may have had a new probation period there, not Engleside. (Tr. 460-61). While GCX-20 shows Humphries working as a regular ("City Carrier") at Engleside in 2016, the document does not indicate that she (or anyone) had a probationary period there. (Tr. 444) Khan stated that he knew she did receive evaluations while at Engleside (likely as a CCA and lost now), but that any probation period related to her conversion to regular took place at Kingstowne. (Tr. 461)

Mr. Khan also tried to explain the difficulty of interpreting the documents and the

[8] Khan was referring to the Community Post Office, located nearby. Please take administrative notice under FRCP of an official government document publicly available: http://www.postallocations.com/va/alexandria/community

[9] Humphries' seniority date in 2015 was shown as 2014. Khan explained that seniority dates change for CCAs based on their current appointment and that a later term appointment results in a new (more recent) seniority date, until the employee becomes permanent. (Tr. 456)

difference between an official assignment for a Form 50 versus actual working assignments. He mentioned Walker, Issa and Sinclair as examples where the employee is officially assigned to the Alexandria Main office but who may work at times at other locations and be listed at one or the other or both. (Tr. 462-63) He also explained that official assignment locations are impacted by other contractual provisions such as a "hold-down" or a "bid" and that these contract rights might affect where an employee is officially designated and may also be affected by whether the employee is a CCA (term, non-career employee) rather than a permanent employee with a fixed assignment. (Tr. 463)[10]

Mr. Khan testified that he was aware of several evaluations for employees at Engleside, including McCree, Humphries and Hintz (which he could not locate). (r. 426-27) He also knew of the evaluations for Pretlow, Walker, Hemphill and Farmer, which were located and produced to General Counsel. (GCX 12, 21, 22) So there were seven (7) evaluations from Engleside.

The Few Missing Documents at Engleside

Both Ms. Clemmer (the Labor Relations Manager) and Mr. Khan testified about the numerous efforts made to find documents responsive to the GC subpoenas and for supporting Respondent's case generally.[11] Over a period of many months and in contacts with numerous

[10] Mr. Khan tried to explain the possible reasons why Walker was not on the Engleside spreadsheet. (GCX-20) He explained some of the anomalies that take place in officially documented assignments. (Tr. 462) Respondent counsel made an offer of proof that is less charitable. (Tr. 464-65) In summary of that: USPS has an antiquated system and the system is only as good as the efforts to maintain it and create, store, keep and retrieve records. There are many lapses and at many levels. Record-keeping does not always keep up timely with events and finding records later is difficult even under the best of circumstances. We also have substantial budgetary constraints that prevent adoption of a world-class and modern (and effective) document system.

[11] It should go without saying that in this case, the critical documents are the Form 1750 evaluations for probationary employees at Engleside. GC suggests that their absence has legal significance and Respondent would use them to support its defense against the allegation of disparate treatment. Obviously, Respondent had every incentive to find any and all such documents as each one would bolster its case and corroborate Mr. Khan's testimony that evaluations were conducted. Finding them was a good thing, not finding them would be a disadvantage. This does not lend itself well to an adverse inference finding that Respondent allegedly elected not to produce the documents out of fear of what they might disclose. Any 1750 is a good 1750. A lack of them is not helpful at all. So Respondent repeatedly urged management at many levels, at many times, and in many locations to find as many 1750s as possible. And Khan and Clemmer testified about those efforts. There'd be no point in

managers at numerous cites, Ms. Clemmer attempted to locate and produce documents responsive to the subpoenas regarding employees at Engleside (and elsewhere). Clemmer also searched repeatedly on her own for paper documents and electronic records. She had the Engleside facility searched repeatedly. She turned over everything she found. (Tr. 379-384) While the electronic personnel file system is available to her, evaluation forms are not included in those centralized electronic files, but are kept locally. (Tr. 383)

Mr. Khan also searched for documents at Engleside at length and repeatedly. He described his repeated efforts and that he looked in every office, every drawer, every cabinet or or desk. (Tr. 425) He found only a few 1750 forms.

Ms. Clemmer explained that many documents at numerous facilities had been lost due to the destruction of furniture, cabinets, files and folders by the Postmaster. She described some of her own experience with the Postmaster's destruction of office equipment and furniture and the entire contents of desks and drawers. (Tr. 384-390) This destruction took place at the Engleside facility and many others. Her recollection was that it occurred in at least nine facilities and spanned several years at various times. Ms. Clemmer identified a removal notice to the Postmaster detailing some of the destruction. (RX-19)[12] Clemmer described that all kinds of

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hiding that ball, obviously. It would make no sense then to draw an adverse inference that Respondent intentionally chose not to produce documents that would in fact be useful to its case. A hostility to production in this sense is absurd. As it happens, much of the controversy is a bit of a red-herring. There were only a few examples of any possible evaluations that were not found (possibly those for Ruffner, Hintz, Humphries and McCree) There is no evidence of other probationary employees at Engleside during the relevant period, and even these employees were not converted to regular and were not comparators to Pretlow. The initial disparate treatment theory was based on an error about three employees whose information now shows they were not comparators at all. The new theory suggests comparison to CCAs generally (even if they weren't converted). There were only a handful of those and there are some evaluations that can be located and some that can't. It is difficult to draw any hostile inference on that minimal record. Walker was evaluated virtually simultaneously when Pretlow was evaluated, though beginning about two months later. But even though there were only a few earlier evaluation opportunities, there is very good reason (unfortunately) that more documents were not found. The evidence of the Postmaster's destruction of furniture and files is the reason, and that reason does not leave room for speculation or an "inference" to be drawn to the contrary. But, given the few records at issue (not found) it makes sense not to belabor the point too much.

[12] The NOPR was received "under seal" and the Judge agreed to withhold any reference to the official's name.

documents were simply thrown in the trash by the Postmaster, including personnel files, grievance settlements, pay checks and information, disciplinary records, etc. Anything that was in a desk drawer or on the desk was thrown away when the Postmaster decided the desks looked messy and that this happened throughout the city. (Tr. 386-90)

This destruction had a huge impact on labor relations operations. Clemmer estimated that there have been many hundreds of times that important documents were found to have been lost despite a critical need for them. (Tr. 390-96)[13] The Postmaster's removal was proposed on June 11, 2018 (three weeks before the hearing). See RX-19, regarding, *inter alia*, throwing away office cabinets, supplies, files and furniture, including personnel documents. (Pgs. 11, 14)

Mr. Khan testified about his first-hand observation of the Postmaster's destruction of furniture, cabinets and drawers, including personnel files at Engleside on several occasions during 2015, 2016 and into 2017. (Tr. 427) He described how the Postmaster would become angry about messy desks or things out of place and would then have everything taken out to the dumpster and thrown away. He threw away desks, tables, chairs, stools, office cabinets and all their contents, including employee files, grievance documents, pay documents, financial statements, and office receipts – everything in the desks or cabinets without regard to their contents or value. (Tr. 428-30) Khan observed the same destruction at other locations. (Tr. 430-31) As a subordinate, Khan was powerless to stop the Postmaster.

[13] The Judge suggested during the hearing that this problem is something that might have been shared with the General Counsel prior to the 2017 hearing. Counsel was completely unaware of the issue then as no one mentioned it until shortly before the hearing in 2018. In 2017, there were simply no documents to provide and the appearance that they simply did not exist. Upon further scrutiny at other offices recently it was revealed that there were missing documents elsewhere and then an explanation was sought and found. However, the subpoenas were not interrogatories. They did not ask for an explanation why documents did not exist. The subpoenas merely asked for documents. There was no opportunity, no need, and no information to provide earlier. When the property destruction was discovered and the Postmaster's NOPR was obtained, it was promptly turned over to GC, despite there being no obligation to do so. The NOPR and its contents were never a subject of subpoena. Respondent turned it over pre-trial simply to be above-board (again). This cannot reasonably be a ground for criticism.

It was Mr. Khan's belief that the earlier evaluations for Humphries and others were thrown away by the Postmaster during his fit over messy desks. Since those Form 1750s were included within the employee files that were thrown away, the 1750 forms were lost. (Tr. 430) This destruction had nothing to do with Pretlow's case and several of the purges took place before Pretlow had even arrived at Engleside.[14] That some few 1750 Forms cannot be found now is explained fully by the Postmaster's purges.

There are many 1750 Forms from other facilities in Alexandria. Respondent's exhibits 20, 21, and 22 are examples that were found in the recent searches. They comprise a couple hundred carrier evaluations during 2014-2018.

Respondents Exh. 21 is comprised of approximately 98 evaluation forms spanning 2014 through 2018. Of significance (perhaps) two of the evaluations show a work location code of "04" which indicated Engleside. Those two forms may have been for Engleside employees, though it is unclear from just these records. (RX-21, pgs. 50 and 54 – Reynolds and Borum) What is clear is that there were hundreds of evaluation meetings (three per employee form, and 200 forms). It is hard to characterize Mr. Pretlow's evaluation as an anomaly or disparate treatment compared to others.

Respondent's Exh. 22 contains several more evaluations. These are less significant for the number than the content. Jorge Milian was originally hired as a CCA 1/12/2015 and was separated in March 2015 due to an injury. After the union filed a grievance, Mr. Milian had his

[14] In reality, contrary to the initial assertion by GC, this was not the "destruction of evidence", but something utterly different and not legally related at all; it was the antics of a madman out of control. Appropriately, and not quite ironically, he was terminated. Under the circumstances, it hardly seems reasonable to entertain an adverse "inference" that the 1750 forms were purposefully withheld in fear of litigation, when there is a demonstrable and compelling (albeit bizarre) explanation for the documents' demise. Whether there were 3 such 1750s or 33, or 103, the fact that that they cannot be found is explained completely by eyewitness accounts, documentary evidence of the offender's discipline, and years of struggle making due without all sorts of critical business records. We can't make this stuff up!

probationary period extended by 60 days and was reemployed. He subsequently resumed probation, was evaluated and was successful. (pages 3-4). Despite his prior termination and "PCA" resulting in reinstatement (like Pretlow) he continued forward and was not successful.

Yolanda Spencer was hired as a CCA in 2015. She had many "unsatisfactory" scores during her first and second evaluations. But, she continued to improve and completed her evaluation with "outstanding" marks in all categories. (pg 6) See Ahn Tran (pg 7) These and many other employees had shaky starts and received criticism (constructive feedback) during their evaluations. But they improved and passed probation. Pretlow's belief that any criticism during evaluation was a pretext for termination is not reflected in these hundreds of evaluations.

Ms. Clemmer explained the need, purpose and benefit of evaluations. (Tr. 406-413) Although it should be self-evident, Ms. Clemmer described the many benefits of evaluations both to the employee and to the company. Evaluations give an employee notice of his progress and a chance to improve with coaching and mentoring. (Tr. 406-07) If employees are told about problems and flaws early on they have an opportunity to improve and retain their jobs. USPS can terminate probationary employees without recourse so it's best for the employee to receive feedback before it's too late and while deficiencies can be overcome. (Tr. 407, 409-10)

She stated that it is very common for employees to have problems when they first start and USPS could terminate them without conducting evaluations at all. (Tr. 410) But it makes sense for both the company and the employee to maximize the investment and reduce turnover by having god training and periodic feedback in the form of evaluations.

Because of the importance of evaluations, USPS can terminate a probationary employee for refusing to participate in an evaluation. (Tr. 411)[15] Such refusal would indicate a substantial

[15] See *USPS and Shelley Oglesby*, 07-CA-170211, JD-24-17 (4/18/17)(Judge upholds termination of charging party for refusing to participate in CCA probationary evaluation)

barrier to progress and frankly insubordination.

Despite the seemingly critical or possibly adversarial nature of a negative evaluation, Ms. Clemmer testified that evaluations are not used as a means or opportunity for imposing discipline or termination. (Tr. 413) They are merely corrective and instructive, and as a result, they are not meetings where a *Weingarten* representative is needed or allowed (generally). (Tr. 408) There would also be no need to create a subterfuge for terminating a probationary employee, given that they are already essentially at-will and can be terminated without having to demonstrate just cause or being able to grieve separation.

Analysis and Argument

General Counsel's case rests entirely on conjecture and speculation. This is not rhetoric; it's a fact. It is premised completely on supposed animus that is allegedly demonstrated by the timing of the evaluation and the fact of the evaluation. Noting more. And a great deal less. This supposed animus is created only by an inference that Pretlow was treated differently than others. There is no direct evidence of such disparate treatment either. Rather, there is again (only) the assertion of another "inference," the inference to be drawn from allegedly missing documents. This is akin to a Sherlock Homes spoof about the dog that did not bark during the night. What can General Counsel surmise from the absence of the barking dog. Plenty, according to GC's theory. The theory results in a finding of malice, which is the missing link between Charging Party's admittedly protected conduct (grieving). But, Pretlow's right to grieve and his freedom from reprisal is beyond dispute and is acknowledged in full. But proof of PCA and proof of subsequent adverse action is not sufficient to make out an NLRA violation. Instead, more is demanded of the prosecutor. A compelling connection is required showing a "nexus" between the PCA and the discipline. And that's the critical ingredient that is utterly missing in this case.

Clearly, Mr. Pretlow's behavior was aberrational during his evaluation and during his termination meeting. He literally had to be taken to the psych ward, and how many employers can legitimately say that? Who would defend such an employee? Who would fault such an employer? General Counsel, or rather Counsel for General Counsel, and in actual fact several advocates for Region 5 have been sent to the plate to take a swing at this case. And swing they have. While they cannot change the facts (like basic physics) they have put forth ingenious arguments to spin substance out of thin air, much like trying to steal first base while arguing with the ref. But the rules do not permit such ruse. Even inferences have to have some basis. Here, they do not.

In this case there was never a single bit of evidence of malice or animus against Mr. Pretlow upon his return. It may have been hard for Pretlow (and perhaps CGC) to believe that an employer wouldn't be automatically vengeful upon reinstatement. Pretlow saw villains and plots in every utterance, even in a simple "Have a nice day." He has an excuse for that kind of blatant paranoia. After all, he appears to suffer from some very serious emotional disorders that have required hospitalization and psychiatric evaluation, having been removed from the Postal parking lot strapped to a gurney. And it's not his first brush with emotional outburst. Nor his last. Pretlow has attacked (rhetorically) each and every person he's been connected with throughout these proceedings. He first went after his union and then his union representative. Next he focused on imagined collusion between management and union in a supposed plot to get rid of him. He lashed out at labor relations on any level. He's gone after the Judge, demanding his termination; likewise he went after the arbitrator for ordering probation. He's even gone after CGC for supposedly failing to represent him adequately on appeal. All of this and more. But who can blame him. He's crazy (used commonly not as medical jargon). But what of CGC? What compels the continued prosecution of this dubious case?

The point is, there is no evidence. None. An inference must be based on something. And it exists only to fill avoid that is not otherwise explained. It is inferred from the absence of other causes. Here, there are plenty of other explanations, compelling explanations, unrefuted explanations, for each and every bit of the chain that the General Counsel's theory of disparate treatment otherwise depends upon. Only one weak link in that chain is needed to break the chain and the inference. Here, we have not one weak link, but an entire chain built on weak links.

But the single, most critical of the links to causation (and malice) is the allegation that Respondent engaged in disparate treatment of Pretlow by subjecting him to evaluation. That link is allegedly based on the inference that others were not evaluated before. There's no direct evidence of that either. So that critical link is also based on an inference that if there aren't any prior evaluation documents, then (inferentially) there must not have been prior evaluations. Oddly, CGC claims that it is entitled to an adverse inference because Respondent did not provide evaluation forms, as though hiding them would be better for our defense. So the critical claim – that there must not have been prior evaluations – is itself merely the product of an inference (and one that makes little practical sense). It is the cornerstone or foundation if you will of a house of cards. So let's start there. (Amazingly, CGC also demands that Respondent be precluded not only from offering the documents it claims we've hidden, but also prohibited from even explaining what those documents were. So CGC simultaneously bases its entire case on an alleged absence of evidence, and then argues for the preclusion of that same evidence.)[16]

An inference exists only to explain or fill in the blanks for missing information. Here,

[16] Counsel is mindful of the pained tone and means no disrespect to Mr. Kopstein, who has advocated honorably, despite being sent in to pinch-hit while given seemingly desperate signals from third base. Rather, Counsel's frustration is based on the apparently frivolous and unfounded and shifting theories put forward and what feels very much like abusive prosecution. Not every aberrational claimant deserves a trial under the Board's rules and regulations, at least not when Counsel worked for Region 5. Regions are entrusted with wide discretion to reject cases, especially after the underpinnings for prosecution have been resoundingly rejected.

we don't have missing information. So an inference in this case is a fiction, designed to fill in the bare spots of the General Counsel's case. Inference would be used as a gimmick to mask the absence of real evidence.

General Counsel starts from the presumption that Respondent did not conduct evaluations previously. It then supposes that any evidence to the contrary must be rejected (if it's documentary) or alleged to be perjury and deceit (if it's testimony). But that's not the logical beginning. Malice and deceit should not and, in fact, cannot be presumed. In all good faith General Counsel believed, at the beginning at least, that Respondent had similarly situated employees who were CCAs and converted to regular carriers but who were not given evaluations. Even that much is not proof of retaliation. Even that differing treatment by itself (if true) doesn't mean there's malice and reprisal afoot. Such different treatment could be explained by other facts. But the Region rejected any other explanation and went forward with the complaint. Now, even then the Region had in its possession Ms. Walker's evaluation from October 2016 which both showed others being evaluated (not just Pretlow) and also that Walker was not actually a regular city carrier (unlike Pretlow). So there was already two holes in the Region's theory. But the Region pressed forward. During the 2017 hearing Mr. Khan testified that there were no other similarly situated employees like Pretlow; no one else who had been a CCA and was converted to regular and therefore had to undergo a new probation period. He also explained that Walker, Ruffner and Hintz were not regular employees, ever and so were never in Pretlow's position. General Counsel called him a liar, not because he was proven to have said something untrue, but merely because his testimony did not fit their theory. They had no documents that contradicted his testimony nor any rebuttal testimony from anyone else. Yet, in the brief the General Counsel repeatedly characterized Mr. Khan as deceitful. On the record this time around, General Counsel has stipulated to the very facts that Mr. Khan said previously.

So now General Counsel agrees that Walker, Ruffner and Hintz were not converted to career status and therefore were not similar to Pretlow. That much was known to CGC well before the 2018 hearing. But General Counsel would not retreat, despite its original theory evaporating with proof that Mr. Khan was telling the truth all along.

Now GC is pursuing a new theory; that all employees were similar to Pretlow and therefore Respondent must prove that all employees had probationary evaluations. And from that new theory all these new inferences must sprout.

But the fact is that General Counsel has no idea who was a probationary employee or when at Engleside. Frankly, Respondent doesn't have definitive records of that either. So there is an absence of complete documentary evidence about who may have been probationary while at Engleside. But the absence of records does not prove malice. It only creates a question.

Mr. Khan answered that question for the most part. Many USPS documents filled in much of the rest. The absence of records might seem to General Counsel as proof positive of malicious intent, or at least grounds for an inference of one. It is neither.

The absence of some records, the critical records (1750s) is explained entirely by the behavior of the terminated Postmaster. In a fit of anger (several in fact) over messy desks, he threw out the desks and all their contents, as well as numerous file cabinets with personnel folders. It is bizarre, yes. But it is corroborated and documented and unrefuted. So while it is certainly unusual and unbelievable, it is also credible. And it fully explains any and all missing documents from Engleside. The evidence does not permit an "inference" of some other cause. We have a compelling and irrefutable explanation. There is no legal room for an inference.

So, does General Counsel accept the explanation and recognize that there are legitimate reasons why it cannot have documents that would prove Respondent's innocence? Does it rely on other documents and testimony (also unrebutted)? No. Again it will (likely) allege deception

and blast the witnesses' credibility. Now, it seeks sanctions, to prevent even the utterance of the explanation. That's absurd.

Regarding sanctions, there was no conduct that demonstrated a basis to suspect any intentional withholding of evidence. General Counsel claimed that all kinds of documents should have been produced in 2017 and weren't. There were no documents that were withheld. Instead, Mr. Khan made a diligent search then and simply did not find any documents other than the large cache that was turned over electronically to General Counsel before the start of the 2017 hearing. She used very few of the hundreds of documents we produced.

However, in 2018, in further preparation for the next hearing, Mr. Khan looked in every drawer in every desk and every cabinet and found two (TWO) more evaluations that had escaped his search previously. And from that trove of new documents, General Counsel cries foul and demands sanctions for not having produced them earlier. But that simply wasn't possible. The documents did not even exist at the time of the 2017 trial. Instead, the evaluations of Hemphill and Farmer (GCX-21 and 22) were created months after the trial and long after the Judge's decision and the GC's appeal. So their non-production at the time of trial was not a thing of any kind since they did not exist. However, CGC now claims that Respondent's obligation was a continuing one and that Respondent should have known that we were required to continually send any evaluations and any other relevant materials to the Regional office even long after the trial was over and the lights were turned off. Never mind that the Region could not possibly have been harmed by our failure to turn over documents that were only created well after the case was decided. But we did turn over the trove before the hearing in 2018. As far as the theory that Respondent USPS is somehow burdened with a continuing obligation to produce subpoenaed documents long after trial is finished and the case is decided, such a claim is preposterous. But CGC made the claim nonetheless. And that is the sum and substance of the

General Counsel's case for sanctions: two documents that didn't exist previously.[17]

Incidentally, the subpoena instructions state that the period of the subpoena means the period from June 2014 through the completion of the hearing herein (which was May 31 and June 1, 2017). Thus, the records to be produced were only those that existed during and up to June 1, 2017. The Farmer and Hemphill evaluations did not exist then and were not within the "covered period" listed in the subpoena. So even they were not actually requested. (GCX-11, pg. 2) GC explains there is a continuing duty described in the subpoena, but that continuing duty applies (if at all) only for newly discovered documents that otherwise fall within the covered period, in other words, documents that already existed but hadn't previously been found. The continuing duty expressly does not apply to documents that were only created after the close of the hearing. GC's allegation of a basis for sanctions, at least regarding these two documents seems utterly frivolous.[18]

Of course, it would have been better for our own case to have had these documents (and any others) earlier. Better still to have found more. But, General Counsel alleges some conscious reason to withhold from discovery documents that would only have helped our case and damaged the GC's theory. GC seeks sanctions because it has somehow suffered from our

[17] This is not a case even remotely on par with *Bannon Mills, Metro West or Dillon Services*. In those cases, *Bannon Mills* in particular, the employer engaged in egregious and blatant unfair labor practices and repeatedly stonewalled in producing documents that were important to GC's case and detrimental to Respondent's defense. It then sought to offer a better factual argument despite refusing to provide clearly relevant and clearly available documents. For all of that conduct, including clearly intentional withholding of adverse documents, the adverse inference was appropriate and sanctions were sustained. That is not the case here. Not even close. A few documents were unavailable initially and a few were mistakenly not provided. All of the documents would have been helpful to Respondent (not GC) so there was no advantage and obviously no intent to shield them from discovery, no harm, and thus no foul.

[18] Practically speaking, does General Counsel seriously contend that its boilerplate instructions demanding a stream of any responsive documents continuing indefinitely into the future mean continuing without discernible end, in perpetuity – even long after the hearing is completed. Respondent strenuously calls foul on any such notion. Does the Region really want to be bombarded with continuing document production for each and every case where they've issued a subpoena even after the case is closed? That's utter nonsense and it would be a gross abuse of authority to seek enforcement of such an unauthorized continuing intrusion on any party without end.

failure to find two pieces of paper that would have supported our case. It is difficult to find a principled rationale for such a claim.

General Counsel asserts that many other documents were produced for this hearing that were not turned over before. He lists Respondent exhibits 10-16 as not produced earlier. It's true, they were not turned over previously. But they were also not subpoenaed previously. GC's subpoena has three paragraphs that it may argue required Respondent to produce some or all of the documents that are now RX 10-16. None of those documents, nor GCX-13 or GCX-20 are actually covered by the terms of the subpoena.

Paragraph 5 requested "all documents relied upon" to evaluate Mr. Pretlow. General Counsel may believe that the CBA, the MOU, the JCAM and the EL-312 handbook provisions fall into that category since they are clearly relevant to evaluations and probationary status. But that's not how the subpoena was worded. It did not ask for all relevant documents. Instead, the request was far more narrow and asked only for documents "relied upon." In fact, neither Ms. Chergosky nor Mr. Khan relied on any documents to conduct the evaluation. Both managers knew about evaluations and probation status already and Mr. Khan was told about the new requirement to evaluate CCA's converted to regular. He didn't receive any documents. Therefore there were no documents that Respondent "relied upon." That resolves GC's claim related to RX-10-14.

The personnel files for Walker, Ruffner and Hintz are another matter. Those files do not exist at the Engleside facility and local managers had no means of producing them. Admittedly, counsel also misconstrued the scope of the request for information about other probationary employees and mistakenly interpreted the request to seek only information about employees like Pretlow (CCAs who had been converted to regular and were in a probationary status on that basis). We were not looking for probationary employees who were CCAs or regular, but rather

only those (like Pretlow, and true comparators) who were both CCAs and converted to regular. Knowing there were no such employees other than Mr. Pretlow himself, there was no further inquiry about all CCAs.

Respondent's defense in 2017 was simply that Respondent had not engaged in retaliation when it terminated Pretlow for his outbursts. Respondent consistently asserted that Walker, Ruffner and Hintz were always CCAs and never regular carriers and therefore were never similarly situated to Pretlow. But that was a defense to a minor (and seemingly remote) allegation in the complaint and there was virtually no actual evidence or contest put on by General Counsel at trial. Respondent had little reason to think the status of CCAs was an issue. The Judge admonished General Counsel that there was no evidence of a disparate treatment claim and General Counsel did not produce any thereafter. Consequently, Respondent was not concentrating on this verbiage in the subpoena. And during the trial, after Respondent turned over hundreds of other documents, General Counsel did not inquire about the records for Walker, Ruffner and Hintz.

Again, it would have been to Respondent's advantage to have produced these OPFs then. If we had, and if it was clear then that General Counsel's entire theory of disparate treatment was fundamentally mistaken, we might have concluded the case then and there. If there was any inkling that proof of their status would have been necessary to rebut the allegation of retaliatory termination about Pretlow we would have produced it. It is evidence in our favor then and now. There was certainly no reason to hide exculpatory information. Our failure to produce it then has been our injury not General Counsel's. However, the Judge required these records on remand, and we would have produced them anyway once we realized they were relevant to an actual contested issue. The oversight previously was innocent, though it has perhaps prolonged the case, to Respondent's detriment. It seems unlikely and inappropriate to call for sanctions

under these circumstances, especially when this information has been expressly requested by the Judge and is useful to determining the merits of General Counsel's case. Moreover, sanctions would seem rather pointless given that General Counsel has already stipulated to the status of these three CCAs, making the corroborative documents mostly irrelevant.

That leaves only the placement letters (GCX-13) and the Engleside employee spreadsheet. (GCX-20) Neither document fits within any paragraph of the subpoena. Paragraph 8 deals with probationary status of Engleside employees. Neither GCX-13 nor GCX-20 provide any information about probationary status. GCX-13 is information about employees who were hired directly into the Alexandria Main facility, not Engleside. The spreadsheet does not list start dates and does not mention probation at all, only that the employees were employed at Engleside at some point in those years. To the extent that the OPFs for Walker, Ruffner and Hintz were actually requested earlier (regardless of their value to General Counsel) Counsel apologizes for the oversight in failing to produce them. We have already borne the consequences for that error. General Counsel gets another bite as a result.

The Merits of the Claim of Retaliatory Evaluation

The suspicion that Respondent used the evaluation as a tool and pretext for retaliation was always farfetched, depending on a calculation that Pretlow would misbehave. It turns out there were many other good reasons for evaluation. Those independent bases include:

- That the Arbitrator ordered probation and a period of review (evaluation);
- That Respondent has numerous pre-existing rules requiring evaluation;
- That USPS and the NALC had recently agreed that evaluations were necessary;
- That any attempt to assure Pretlow had ample basis to succeed would begin with sufficient training and adequate feedback (evaluation);
- That feedback and mentoring (evaluation) are best-practices generally;

- That hundreds of other carriers had been similarly evaluated previously;
- That Mr. Khan believed it was now required, regardless of what had happened before; and
- That, according to the prior decision here, it would have been impossible to predict Pretlow's behavior, thus removing retaliation as a real possibility.
- As a practical matter, Respondent didn't actually need an evaluation if it was merely looking for a reason to fire Pretlow. As a probationary employee (at-will) Pretlow had no job protections and could have been terminated for any misstep and could not have grieved. The subterfuge of an evaluation was unnecessary.
- Moreover, evidence about retaliation points the other way: Khan and Chergosky went out of their way to accommodate Pretlow and give him a chance. There is no actual evidence of malice whatsoever, and some evidence of real benevolence.

For all these reasons, and more, it should be completely clear that USPS had every reason, every right, and in fact an obligation to give Pretlow evaluations as part of his probation status, in order to aid in his training and to help him (and USPS) to move forward.

The Judge's prior decision makes it clear there was nothing improper about the evaluation. The 2017 decision recounts the Arbitrator's conditions for Pretlow's return. "[Arb. Braverman] also ordered that Pretlow would have to serve the remainder of the 90-day probationary period that is required for employees who are converted from CCA to regular status." "She ordered that he would remain in probationary status until he completed the remainder of his 90-day probationary period." (JD-61-17 at 2 and 3). Further, the Judge noted that on Mr. Pretlow's first day back to work, May 4, 2016 "Khan informed Pretlow that his performance would be evaluated since he was a probationary employee. Khan and

Pretlow initialed a blank evaluation form (Postal Service Form 1750)." (*Id*. at 3).

The Judge rejected General Counsel's claim that the evaluation was a "set-up." (*Id*. at 5). The Arbitrator's order of reinstatement in probationary status required Pretlow to be treated like any other probationary employee and thus be evaluated. The Judge pointed out that General Counsel's theory of retaliatory evaluation was without merit. He concluded: "Moreover there is nothing in this record that would lead one to conclude that Respondent's managers should have anticipated that Pretlow's outburst in reaction to his performance evaluation." *(Id*. at 6). The Judge concluded that the evaluation itself could not have been intended as a set-up since no one could have predicted how Pretlow would behave.

The Judge had previously pointed out during the initial hearing the absence of any disparate treatment evidence related to the evaluation. (Tr. 126). The Judge admonished Respondent to move on to deal with the evaluation meeting itself, rather than the background information leading up to the evaluation. "They actually haven't made a disparate treatment case." (Tr. 126)

Though General Counsel initially charged retaliation through the evaluation, it put on no actual evidence of malice or hostility. Its only evidence was indirect and based on an inference drawn from alleged failure to evaluate other people who had converted to career like Pretlow. But Respondent demonstrated (through testimony) that there were no such comparators. General Counsel relied solely on the erroneous email that USPS had not evaluated others who were in the same position as Pretlow. The Judge appears to have rejected that inference then. There is no possibility of crediting that inference now, as additional evidence (overwhelming documentary evidence) corroborates Khan's testimony that the three other employees were not actually similar to Pretlow. General Counsel has so stipulated.

Thus the only evidence that GC had previously no longer exists to establish malice and GC has not produced any new direct evidence. Instead, General Counsel simply asserts a new theory of disparate treatment. But that theory is now defeated by the abundant evidence of rules requiring evaluations and a practice of conducting such evaluations – even if there is an absence of documentation of perfectly consistent evaluations. Numerous prior evaluations did take place, hundreds in fact, and some took place at Engleside. About that much there is no rebuttal of any kind. Mr. Khan produced some evaluations at Engleside and explained that there were others he had seen, even if he could no longer find them. No one has been called to contradict that evidence. No document has suggested otherwise. Therefore, no contrary evidence exists.

Khan testified that he learned about the new evaluation procedure/requirement some few months before Pretlow was reinstated, and he informed Pretlow about the evaluation requirement on his first day back on the job.[19] He reiterated that discovery in his testimony this time and guessed that the manager's meeting took place in the spring of 2016 or perhaps April. That timing coincides perfectly with the MOU that NALC and USPS had just signed, directing evaluations for CCAs converted to regular. Consequently, regardless of any prior practice or history with CCAs or converted regulars, Mr. Khan was under the impression that (at least now) evaluations were required for someone like Pretlow. And he informed Pretlow accordingly right at the outset of reinstatement.

There is no contrary evidence of any kind. There is no rebuttal to the MOU evidence. No one suggests this MOU is a fraud. No one suggests Mr. Khan made up the entire story

[19] General Counsel makes much of the Judge's comment that Respondent might have provided more "specificity" about Khan's education about the new evaluation process. (JD-61-17 at 5). However, this is the same "background" evidence that the Judge repeatedly admonished Respondent was irrelevant to the case.

and that the MOU mysteriously fits his narrative purely out of coincidence. No one contests that the MOU may well have been the triggering document for the manager's meeting discussion. Every ingredient is in place to establish that Mr. Khan believed he was required to have Pretlow evaluated and that such belief was based on actual documents (or new rules) described to Mr. Khan by others. No contrary evidence exists. Mr. Khan's good faith belief in the necessity of an evaluation (free of even a hint of retaliatory taint) is manifest, and unrebutted. Absent any other evidence, this by itself is overwhelming evidence of Respondent's good faith basis for the evaluation. And no rebuttal information exists.

The Judge previously rejected the retaliation allegation and stated on the record that there was no supporting evidence. This second round produced no new evidence of retaliation or animus or disparate treatment. If anything, General Counsel's case has lost ground. So what was insufficient to support a retaliation argument previously can no longer pass as even a possible theory. It is utterly unsupported.

Doubtless General Counsel will claim new grounds for supposing disparate treatment based on the absence of evaluation documents about CCAs prior to Pretlow. But that is too thin a reed to support this entire case. It also ignores solid evidence to the contrary.

There are at least two powerful reasons to reject GC's new theory of disparate treatment. First and foremost, there was indeed a strong practice of conducting evaluations at Engleside and in the Alexandria cluster of offices. Hundreds of evaluations have been documented. Some took place at Engleside. Mr. Khan testified without contradiction that he knew of several evaluations prior to Pretlow, including Humphries, McCree and Hintz. The Judge previously faulted Respondent for not producing more background documents. Those documents have now been produced, thus completely corroborating Mr. Khan's testimony. There is no contrary evidence of any kind. There is no contrary testimony. No voice in

opposition, not one shred of actual evidence that remotely suggests Mr. Khan's testimony is not 100% creditworthy. Mr. Khan's testimony is completely credible. Thus his testimony that others were evaluated at Engleside is undisputed. It is consistent with other facts. It is believable in its own right. It is compelling. On the basis of Mr. Khan's sworn testimony alone, there is proof that evaluations took place previously for CCAs and that there were no other employees in Pretlow's shoes (he was no longer a CCA). Mr. Khan's testimony, coupled with the hundreds of other evaluations prove beyond doubt that Respondent had a practice of conducting evaluations for letter carriers. And that practice was based on the very documentation that the Judge demanded be offered. This alone is a compelling basis for rejecting General Counsel's case. But there's more.

The second basis for denying GC's retaliation theory is equally compelling. It does not depend on any prior practice of evaluations for CCAs. So whether there are extant documents of such evaluations doesn't matter at all. Whether there were 2 or 202 prior evaluations makes no difference whatsoever. Mr. Khan learned of what he believed was a new requirement to evaluate probationary career carriers (Pretlow). He learned of this requirement shortly before Pretlow returned. That discovery is purely coincidental to Mr. Pretlow's reinstatement. And while General Counsel disparaged the testimony after the first hearing (and the Judge suggested some corroboration would have been nice), any doubts about that discovery have now been laid to rest. The details of the March 2016 MOU and the timing are compelling and undisputed corroboration that Mr. Khan was telling the truth about the evaluation discovery in the spring or April of 2016. We have now provided the corroboration the Judge sought that General Counsel previously dismissed as nonsensical. This discovery was a game-changer for Mr. Khan. Whether he was aware of the same rule previously existing or not, he was advised that there was a new policy and he felt compelled

to follow it. Mr. Pretlow then stepped onto the scene and was the first person about whom the policy was applicable. Mr. Khan applied it to Pretlow, as described in the MOU. Whether Respondent evaluated others or CCAs previously (just thrice or more often) is completely irrelevant. Mr. Khan's discovery of a new requirement is a sufficient and compelling basis for Mr. Pretlow's evaluation – even if that evaluation differed from how CCAs were treated before. Prior practice and history didn't matter. The MOU and Mr. Khan's new understanding of it represents a new circumstance, and one that is utterly free of even a hint of ill-will. Mr. Khan was merely following reasonable orders (signed by the union) that he was told about, coincidentally, just before Mr. Pretlow's arrival.

It is impossible to entertain an "inference" in these circumstances. An inference attempts to fill in the blanks for actual evidence that is missing. Here, there is no missing evidence, no unexplained reason for evaluation. Here, the reason for evaluation was plainly obvious and clearly documented. There's no room for conjecture about a different reason, let alone a suspicious one. Mr. Khan's testimony about his good faith belief that an evaluation was required because of what he was told is by itself utterly credible. More than credible, it has now been corroborated and substantiated beyond any possible doubt. The national parties agreed that such evaluations were required and they did that barely two months before Pretlow's return. Therefore, unless Pretlow alleges that it was the national union colluding against him by requiring evaluations for people like him, it was his own union that set the evaluation in motion by signing the MOU. As a result, prior history is of no significance. Circumstances changed. Mr. Khan's discovery of a new policy was THE basis for the evaluation and that discovery is fully supported in the record. General Counsel puts forward no evidence of any kind that would contradict any part of this evidence in the slightest way. Other than to simply smear Mr. Khan because he is a management witness, there is no basis

to find any fault with Mr. Khan's credibility. And it seems impossible to separate Mr. Khan's testimony from the corroborating MOU both in timing and substance. General Counsel cannot attack the documentary evidence at all, and there is no basis to allege that the documents are somehow irrelevant to the testimony.

It may be that General Counsel was suspicious of the convenient (uncorroborated) testimony in the first round. It would certainly have been better to have produced this additional evidence then. But the Judge made it clear that we would stick to the facts taking place the day of the evaluation, not what happened before or after. GC also did not actually make out a disparate treatment claim and what it did allege was shot down by Mr. Khan's unrebutted testimony. So there was little reason to defend further an accusation that had not actually materialized as a *prima facie* case. There was also substantial risk in putting forward evidence the Judge seemed disinclined to consider relevant. We are where we are now. The corroborating documents have now been produced. General Counsel's prior belief that Mr. Khan lied should now be discarded in light of the strong corroborating evidence. Nonetheless, the only way for General Counsel to prevail is to attack Mr. Khan's credibility, so attack it will. In light of the overwhelming evidence that Mr. Khan is, was, and has always been telling the truth, General Counsel might be better served by a different theory. Unfortunately, any other option would foreclose any practical path to victory. Thus, despite all evidence to the contrary, General Counsel seems bent on winning by any means necessary, even if that requires attacking the character of a diligent and honest witness whose testimony has been clear, consistent and now corroborated throughout.

And it's not like General Counsel has a witness whose testimony is contrary, providing at least some basis for attacking Khan. No. Here, there is no countervailing evidence. No contrary witness. No contrary document. No actual contrary evidence of any

kind. Rather, there is only General Counsel's own theory, based entirely on conjecture, based on unsupported inferences drawn exclusively from a presumed belief of malice. Khan (and the Postal Service) must be lying about everything since Pretlow was fired and had previously filed a grievance. No other possibility passes the intellectual barrier and the presumption ill-will. So attack Khan it must merely because Pretlow must be defended at all costs – he filed a grievance after all. And having once filed a grievance, Mr. Pretlow must be saved from harm for ever more no matter what he does. But that's not the law. Not yet, and not likely soon. General Counsel might think twice before poking the bear over this case and this claimant and these facts.

It is also worth mentioning again that there is not only an absence of evidence of malice, but there is also solid evidence of benevolence toward Pretlow, which Pretlow himself corroborated. Khan testified that he was determined to leave Pretlow alone and that he tried to minimize contact so as not to antagonize Pretlow. He also praised Pretlow for good work in the early days. He did nothing at all out of the way to intimidate, threaten or even disparage Pretlow. He removed himself from daily management of Pretlow just to give Pretlow space to excel. That's the opposite of retaliation.

Chergosky repeatedly reached out to Pretlow to try to reassure him, coach him and provide positive feedback. She even sent him inspirational messages and wished him a nice day via texts. When there were issues related to attendance and performance and even a customer complaint, which under normal circumstances would have been grounds for immediate termination of a probationary employee, Chergosky chose to ignore these defects. She could have pounced on Pretlow immediately, but she did not. Instead, she continued to try to encourage him and allow him to improve.

By any normal assessment, these were not the acts of angry people bent on retaliation

and looking for a chance, any chance, to remove a so-called troublemaker. No, these were the actions and words of innocent people, managers who had no thought whatsoever of retaliation. As Mr. Khan explained, grievances and victorious employees are a routine feature of life in the Postal Service. He took it in stride and didn't care and wasn't bothered that Pretlow won reinstatement. He was not even a little disposed to retaliate. Chergosky herself had just come from the ranks of union membership. She was only recently promoted to supervisor and had no reason to be opposed to union activity. Both were innocents. Both acted benevolently and not even a little bit did they do or say anything hostile.

For all of this good cheer Mr. Pretlow found fault. He lashed out at Chergosky for sending him unsolicited inspirational messages. He disavowed any need or desire for her protection or comforting words. (See RX-7) He attacked Khan for inconsistency, praise one day, scorn the next. But the evidence of scorn, ridicule, constant berating and sabotage did not exist, at least not beyond Pretlow's own imagination. There is only one incident that Pretlow could describe as evidence of persecution. It related to what Pretlow perceived as an attack on him personally and an attempt to ridicule him on the work room floor. Recall that this one incident was described vividly by Chergosky and Khan and it has no resemblance to the persecution imagined by Pretlow. Pretlow needed help finishing his route (that's utterly normal). Khan reminded Chergosky to make sure she put a notation in the assignment system describing the need to assign someone to provide the assistance Pretlow required. This was a commonplace annotation of a purely routine nature with no negative connotation of any kind. And Khan did not even use Pretlow's name. Rather, Khan merely referred to the need to provide assistance for a particular delivery route number. It is the equivalent of mentioning the need to note a change of address was filed. From that simple remark (to Chergosky) Pretlow spun a fantastical story about bullying and personal attack and an intentional effort to

demean him in the eyes of all his peers. He alleged is as clear proof of animus, hostility, retaliation and basic meanness directed at him solely due to his protected activity. And General Counsel ate it up, swallowed it all, hook, line and sinker. This one incident (innocuous to any sane person, absurd even considering the actual content) was seized upon by General Counsel as proof positive of a continuing effort to harass Pretlow. Apparently no critical faculties were employed to assess the realities of the situation. General Counsel thus presumes malice going forward at every turn based on this one incident, which can only be characterized properly as a demonstration of Pretlow's extreme paranoia and his penchant for over-the-top and histrionic story-telling. It should have been a flashing red-light about Pretlow's credibility and sanity. Instead, General Counsel seized upon it as the proof of continued maliciousness by management. Never mind the realities or any sane explanation. But that one anecdote seems to animate General Counsel's entire case; that and the simple fact that Pretlow was subsequently fired (even if for bizarre behavior). From that one tiny seed (not even a seed really, but a hearsay claim of a seed), the mighty oak of determination to address the retaliation perpetuated by hostile management has grown, and seems to resist any pruning. General Counsel seems hell-bent on prosecuting this case, despite all good sense to the contrary and the utter lack of any actual evidence.

At the end of the day, however, it is not the General Counsel's zeal, nor misguided urge to protect Pretlow at any cost that will decide the case. Rather, the case can only be decided on the basis of actual evidence. And here, Respondent must prevail. For there is simply no evidence on the GC's side of the leger.

No evidence supports any aspect of the retaliation theory. Try as it might, GC cannot create evidence based solely on the absence of some records. Nothing begets nothing. There is no actual evidence of ill will or hostility. There's no evidence Pretlow was even treated

differently from others in his same shoes. There is no disparate treatment. No evidence was put forth demonstrating that some employees were actually probationary but were not evaluated. No such evidence exists and none was produced or even alleged. The only thing GC has is a theory that an absence of records somehow proves that evaluations weren't done. That's not evidence. That's simply conjecture. It could be a reasonable inference, if not for other better explanations. And there are other better explanations. Thus even the inference of differing treatment is nothing but theory, unsupported by any fact. GC did not even prove that there were other comparators or similarly situated employees, let alone that they were treated differently. Pretlow was the first and only converted regular at Engleside. GC no longer disputes even that much. It's difficult to prove a disparate treatment case without comparators. But that's what GC is trying to accomplish. Even if GC proved that others weren't evaluated before Pretlow that by itself doesn't demonstrate disparate treatment, let alone create an inference of bias. Pretlow's situation was new. He was treated pursuant to a new policy. GC hasn't even attempted to prove that others were dealt with similarly or otherwise related to this new policy. And GC has also not proffered evidence contradicting the policy itself. Thus, for the critical actions related to Mr. Pretlow and his unique situation, GC has not put forward any evidence at all. There is a complete void related to what happened to Pretlow and why, in terms of GC's response to the evidence. It's as though GC decided to abandon the batter's box, walk off the field, and decide to play a different game entirely, but not tell anyone. Thus, one compelling reason GC's case cannot prevail is that there is a complete lack of evidence to support it.

The second and related reason that GC cannot prevail is that there is overwhelming and uncontested evidence of the good faith reasons for Respondent's actions at each and every step. So even if GC put on some evidence, Respondent's defense is rock-solid and

compelling and eliminates all doubt about the merits of the complaint allegations.

There are solid reasons, backed by solid evidence for Respondent's actions and its witnesses' testimony is fully corroborated by independent documents. First, the claim of disparate treatment is simply unfounded. There were no similarly situated converted regulars. Pretlow was the first. To the extent he can be compared to CCAs in terms of evaluations, there is abundant evidence (hundreds of evaluations forms) demonstrating a consistent practice of probationary evaluations in the Alexandria cluster of post offices. There were also some evaluations at Engleside, though fewer remain that originally existed. Some evaluations from Engleside were produced, including one for Ms. Walker who was evaluated right around the time that Pretlow left. To the extent there were other evaluations, Mr. Khan saw some of them himself. Some evaluations, even if there were only a few other probationary employees, were undoubtedly lost in the purge by the Postmaster. But that purge does not detract from Khan's unrebutted testimony. And the purge was not complete. Some evaluations remain and were produced. While it may be tempting to be suspicious of the alleged purge, even that was documented by the Postmaster's NOPR, as well as corroborative testimony by both Khan and Clemmer. So unless there is clear evidence of some plot of collusion between the witnesses to lie and the area office to make up the Postmaster's termination document, there can be no question that pertinent documents were lost in the purge and those documents would have also supported Respondent's case. But Respondent needed no further support. Ample evidence of evaluations was already produced and there was no evidence to the contrary. So GC's initial and fundamental theory of disparate treatment is soundly disproven by actual evidence proving the opposite. No disparate treatment took place. What's more, Pretlow's situation was a new phenomenon and Khan was directed to evaluate him by upper management's announcement of a new MOU

with the union. Thus even if other had been treated differently before (and they weren't) there is a sound basis for how Pretlow was dealt with, having nothing to do with retaliation or protected activity. Ample exists disproving disparate treatment. And ample evidence exists showing why Pretlow was dealt with as he was. And none of the evidence was contested or contradicted. It is overwhelming and unrebutted. The lynchpin or GC's case is absolutely disproven by Respondent's evidence.[20]

There was no suspicious "difference" between Pretlow and others. Respondent demonstrated a perfectly reasonable and compelling motive for Pretlow's evaluation; it was required by rule and by the union's own recent agreement. Regardless of any prior history or practice, Khan believed he was newly required to evaluate Pretlow because he was newly converted from CCA to regular and was serving a new probationary period. Documents support his belief and his testimony. Nothing contradicts any of that evidence. These facts do not permit an inference of hostility.

There was no hostility toward Pretlow in any other way. Khan and Chergosky went out of their way to help Pretlow or at least avoid confrontation with him. Respondent put on the evidence it could that their intentions and actions were honorable and above reproach even if Pretlow suspected otherwise. Wishing someone a nice day is actually evidence of good intent, not ill-will. So too was providing positive feedback about Pretlow's performance. Significantly, when there were opportunities to go after Pretlow for poor performance or attendance, management chose not to do so, and instead give him additional

[20] Switching metaphors here, General Counsel seeks to throw a Hail-Mary pass with seconds to go by alleging sanctions should preclude documentary evidence that supports Respondent's case. But that last-ditch effort cannot succeed. GC is down by 20 points with only enough time for one play. No magic in the world can turn that play into a victory. Here. The sanctions tactic only goes so far, if it is appropriate at all (and it's not). Respondent put on all kinds of evidence and documents and testimony. Most of it has nothing to do with even potentially sanctionable (excludable) evidence. Thus even if the offending documents were excluded, there would still be overwhelming and uncontroverted evidence on USPS's side and still nothing on the other. So one amazing unlikely pass cannot erase the score or even come close to evening the score. The sanctions angle is more desperation.

chance to improve and succeed. This is all positive and there is nothing remotely negative in the record that even suggests hostility.

The evaluation couldn't have been a ruse for discipline. No one could have anticipated Pretlow's behavior. But evaluative review was certainly appropriate, especially given the Arbitrator's mandate to Pretlow to behave himself and to learn to get along with others. By placing Pretlow back into probation and admonishing him that he had to prove himself worthy of career employment status, the Arbitrator mandated evaluation. Respondent also acted on that basis, though frankly it would have done so in any event based on the MOU. Nonetheless, the Arbitrator's order is another independent and sufficient basis for the evaluation required to Mr. Pretlow. In any other universe an evaluation should not have been cause for alarm for any probationary employee, in their right mind. For Pretlow, however, probation itself was an outrage and evaluation was simply pretext. But those ravings are not evidence of anything about Respondent's state of mind. They only speak to the state of mind of Pretlow himself.

CONCLUSION

In the end, there are many good reasons for the evaluation. And no evidence of any suspicious motive, plan or action. Evaluation was compelled by the Arbitrator, by the CBA and pre-existing rules, by the recent MOU, and by past practice itself. It was also necessary for Mr. Pretlow's improvement and success even if he did not see it that way. There is abundant evidence the evaluation was completely appropriate and no evidence at all to the contrary.

As a result, this claim too must fail and be dismissed by the Judge. For all the foregoing reasons, Respondent respectfully requests that all of the allegations in the

complaint be dismissed in their entirety. It is, this 7th day of September, 2018,

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Respondent's Brief on Remand** were sent this 7th day of September, 2018, as follows:

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